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Nos. 94-1412 and 94-1432

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

JOSEFA FUENTES, PETITIONER

v.

UNITED STATES OF AMERICA

ROLANDO LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioners were properly sentenced to mandatory consecutive terms under 18 U.S.C. 924(c).

2. Whether the evidence was sufficient to support one of petitioner Lopez's convictions for using a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1).

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OPINION BELOW

The opinion of the court of appeals (94-1412 Pet. App. 2a-17a) is reported at 37 F.3d 565.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1994. A petition for rehearing in No.

94-1412 was denied on November 14, 1994. 94-1412 Pet. App. 1a. The petition for a writ of certiorari in No. 94-1412 was filed on February 13, 1995 (a Monday). A petition for rehearing in No. 94-1432 was denied on November 28, 1994. 94-1432 Pet. App. B1. The petition for a writ of certiorari in No. 94-1432 was filed on February 27, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioners were convicted on one count of conspiracy to distribute heroin, in violation of 21 U.S.C. 846 (Count 1); one count of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 3); and two counts of using firearms during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1) (Counts 4 and 5). Additionally, petitioner Fuentes was convicted on one count of distributing 25 grams of heroin, in violation of 21 U.S.C. 841(a)(1) (Count 2). Petitioners were each sentenced to 63 months' imprisonment on the conspiracy and distribution counts (Counts 1-3); five years' imprisonment on the first Section 924(c)(1) firearms use count (Count 4); and 20 years' imprisonment on the second Section 924(c)(1) firearms use count (Count 5). The sentences on both the firearms use counts were to run consecutively to both the 63-month term imposed for the drug trafficking offenses and to one another. 94-1412 Pet. App. 18a-20a; 94-1432 Pet. App. C1-C2. The court of appeals affirmed. 94-1412 Pet. App. 2a-17a.

1. During September 1991, the Drug Enforcement Agency (DEA) conducted an investigation of petitioners. Two informants, Maria Arellano and Arturo Rodriguez, introduced DEA undercover agent Jose Martinez to petitioner Fuentes on October 1, 1991, and Martinez purchased 25 grams of heroin from Fuentes for $3,200. On that occasion, Agent Martinez stated that he was interested in purchasing large quantities of heroin. Fuentes responded that she would have to check with her source, whom she implied was her husband, petitioner Lopez. 94-1412 Pet. App. 5a.

On October 15, 1991, Agent Martinez telephoned petitioner Fuentes to arrange another heroin purchase. The following day, petitioner Lopez told Arellano that he was prepared to sell ten ounces of heroin. 94-1412 Pet. App. 5a.

Later that day, petitioners met the two informants in a Burger King parking lot to consummate the deal. After informant Rodriguez had verified that petitioners had brought the heroin, he signaled Agent Martinez to arrest them. During an ensuing search of petitioners and the truck they were driving, another DEA agent found a .38 caliber super semiautomatic pistol in petitioner Fuentes's purse and 270 grams of heroin in the truck's cab. 94-1412 Pet. App. 5a-6a.

The agents then went to petitioners' residence. In the master bedroom, they found one gram of heroin and a loaded and cocked .38 caliber semiautomatic pistol in the top drawer of the dresser. Approximately $38,000 was discovered in a purse hanging in the closet of the master bedroom. In addition, agents found a loaded AK-47 assault rifle in the

trash can in the front yard of the residence. 94-1412 Pet. App. 6a.

2. Each petitioner was convicted on one count of possession of heroin with intent to distribute it, based on the October 16, 1991, events, and on one count of conspiracy to commit that offense. Petitioner Fuentes was also convicted on one count of distribution of heroin, based on the sale of the 25 grams of heroin on October 1, 1991. In addition, petitioners were convicted on two counts of using or carrying a firearm, in violation of 18 U.S.C. 924(c)(1).[1] The first of those convictions (Count 4) was based on the carrying and use of the .38 caliber super semiautomatic pistol during and in relation to the possession of heroin with intent to distribute it, as charged in Count 3. The second of those convictions (Count 5) was based on the use of a different .38 caliber semiautomatic pistol and the AK-47 assault rifle during and in relation to the conspiracy to possess heroin with intent to distribute it, as charged in Count 1. 94-1412 Pet. App. 6a-7a.

3. The court of appeals affirmed. 94-1412 Pet. App. 2a-17a. It rejected petitioners' claims that they

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[1] That statute provides, in relevant part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years[.] * * * In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years.

were improperly sentenced under Section 924(c)(1) to consecutive terms of five and 20 years' imprisonment on the possession with intent to distribute counts and conspiracy counts, because both predicate offenses involved a single continuing criminal transaction. The court reasoned that, under settled principles, a conviction for conspiracy and for possession with intent to distribute can each support a separate Section 924(c)(1) conviction and sentence. 94-1412 Pet. App. 13a.

The court also rejected petitioners' claims that the evidence was insufficient to connect the firearms found in Fuentes's purse and at their residence to drug trafficking offenses. With respect to the pistol in petitioner Fuentes's purse, the court reasoned that the jury could reasonably have found that she carried the weapon to prevent the police or other drug dealers from interfering with drug transactions. With respect to the AK-47 rifle and the pistol found at petitioners' residence, the court held that, even if the evidence were insufficient to demonstrate the relationship of the AK-47 to a drug trafficking crime, the proximity of the pistol to drugs and drug paraphernalia linked the firearm to the conspiracy to engage in drug trafficking. 94-1412 Pet. App. 11a-12a.[2]

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[2] Additionally, the court rejected petitioners' claims that the jury was improperly instructed concerning the nexus that the government must prove between a firearm and the predicate offense in order to establish a violation of Section 924(c)(1) (94-1412 Pet. App. 8a-9a); that, where the defendant is convicted of two Section 924(c)(1) violations, each must be obtained in separate proceedings (94-1412 Pet. App. 13a); that the 30-year term imposed upon Fuentes constitutes cruel and unusual punishment (*id.* at 14a); that

DISCUSSION

1. Petitioners contend (94-1412 Pet. 5-10; 94-1432 Pet. 5-11) that they were improperly sentenced to consecutive terms of imprisonment on the two Section 924(c) counts because the predicate offenses—the drug trafficking conspiracy and the possession with intent to distribute counts—were parts of the same underlying crime and based upon proof of the same facts. The court of appeals correctly rejected that argument.

In *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981), this Court held that, in a single proceeding, "the question of what punishments are constitutionally permissible [under the Double Jeopardy Clause] is not different from the question of what punishments the Legislative Branch intended to be imposed." Accord *Missouri* v. *Hunter*, 459 U.S. 359, 367-368 (1983). Accordingly, the question whether petitioners were improperly subjected to multiple punishments turns on whether Congress intended to permit consecutive sentences for the two offenses petitioners committed.

Section 924(c)(1) proscribes "us[ing]" or "carr[ying]" a firearm in relation to "any * * * drug trafficking crime," and thus makes each separate act of using or carrying a separate criminal offense. "In the case of [a] second or subsequent conviction," a defendant receives a mandatory, cumulative 20-

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the trial court improperly limited defense testimony (*id.* at 14a-15a); that the trial court improperly admitted prejudicial evidence (*id.* at 15a-16a); and that petitioner Lopez was entitled to a downward adjustment for acceptance of responsibility (*id.* at 17a).

year sentence of imprisonment. 18 U.S.C. 924(c)(1).[3] Under the language of the statute, petitioners' use of the .38 caliber super semiautomatic pistol during and in relation to the possession of heroin with intent to distribute it constituted one distinct offense, and the use of two other guns (the .38 caliber semiautomatic pistol and the AK-47 rifle found at petitioners' residence) during and in relation to the conspiracy to possess heroin with intent to distribute it constituted a second distinct offense. Accordingly, petitioners were validly convicted of two distinct violations of Section 924(c)(1).

Petitioners argue (94-1412 Pet. 6; 94-1432 Pet. 7) that the two offenses of conspiracy and possession of heroin with intent to distribute it were based upon the same transaction and should thus be viewed as one offense for purposes of Section 924(c)(1). Congress did not base liability under Section 924(c)(1), however, on the number of "transactions" that occurred. Instead, Congress predicated liability upon each "use" of a firearm in connection with "any * * * drug trafficking crime." Congress reinforced that conclusion by providing for increased penalties for a "second or subsequent conviction," 18 U.S.C. 924(c)(1)—not a "second or subsequent transaction." There is no doubt that petitioners each engaged in separate "drug trafficking crimes" by conspiring to distribute heroin and by possessing heroin with intent to distribute it. See *United States* v. *Felix*, 112 S. Ct. 1377, 1385 (1992) ("a conspiracy to commit

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[3] In *Deal* v. *United States*, 113 S. Ct. 1993, 1997 (1993), the Court held that the phrase "[i]n the case of [a] second or subsequent conviction," as used in Section 924(c)(1), does not require that the second conviction be obtained at a separate proceeding from the first.

a crime is a separate offense from the crime itself"). Accordingly, petitioners were properly convicted of two distinct violations of Section 924(c)(1).[4]

The courts that have considered the issue are in accord that a "[drug trafficking] conspiracy and [a] conviction of possession with intent to distribute could each support a separate § 924(c) conviction and sentence."[5] *United States* v. *Privette*, 947 F.2d 1259, 1262 (5th Cir. 1991), cert. denied, 503 U.S. 912 (1992). See *United States* v. *Johnson*, 986 F.2d 134, 136-137 (6th Cir.) (approving holding in *Privette*), cert. denied, 113 S. Ct. 3012 (1993); *United States* v. *McManus*, 23 F.3d 878, 883-884 (4th Cir. 1994); see also *United States* v. *Chalan*, 812 F.2d 1302, 1315-1317 (10th Cir. 1987) (under Section 924(c)(1), multiple firearms counts are proper if the underlying multiple offenses do not constitute a "single offense" for double jeopardy

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[4] In view of the clear scope of the statutory text, petitioners' reliance on the rule of lenity (94-1412 Pet. 7) is misplaced. See, *e.g.*, *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993).

[5] Several recent petitions for certiorari have argued that the courts of appeals are in disarray as to whether a single drug trafficking conspiracy count can constitute the predicate offense for multiple violations of Section 924(c)(1) and that review should be granted to resolve the conflict. See, *e.g.*, *Edwards* v. *United States*, cert. denied, 114 S. Ct. 1403 (1994); *Mejia* v. *United States*, cert. denied, 114 S. Ct. 1079 (1994); *McGee* v. *United States*, cert. denied, 114 S. Ct. 1210 (1994). That question is not implicated here, because the Section 924(c)(1) counts are not based on the same predicate drug trafficking offense.

purposes), cert. denied, 488 U.S. 983 (1988). Petitioners identify no decision of another court that conflicts with the result here.[6]

Contrary to petitioners' claims, *United States* v. *Freisinger*, 937 F.2d 383 (8th Cir. 1991), does not support the view that the unit of prosecution under Section 924(c)(1) is the criminal transaction rather than each conviction. See 94-1412 Pet. 5-6; 94-1432 Pet. 10. In that case, the court held that, when a defendant has been convicted of more than one violation of Section 924(c)(1) because he was carrying more than one firearm during a single drug trafficking offense, the convictions after the first one are not

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[6] Petitioner Lopez's reliance on *Chalan* (94-1432 Pet. 8) is misplaced. In *Chalan*, 812 F.2d at 1317, the court, applying the elements analysis articulated in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), held that the offenses of robbery and felony murder based on the same robbery constitute "a single offense for double jeopardy purposes, and a single 'crime of violence' within the meaning of section 924(c)." Cf. *Harris* v. *Oklahoma*, 433 U.S. 682, 682-683 (1977) (per curiam). The conspiracy and substantive counts in this case, however, are distinct offenses under *Felix* and *Blockburger*. Indeed, the Tenth Circuit itself has distinguished *Chalan* on that basis in a later case with facts similar to those here. See *United States* v. *Abreu*, 962 F.2d 1425, 1433-1434 (1992), vacated on other grounds, 113 S. Ct. 2405 (1993).

Prince v. *United States*, 352 U.S. 322, 328 (1957), on which petitioner Fuentes relies (94-1412 Pet. 8), is likewise of no assistance to her. In that case, the Court ascribed to Congress the intent not to punish separately the entry into a bank with the intent to commit a felony and the consummated offense. By contrast with such greater and lesser included offenses, the elements of a conspiracy to traffic in narcotics and the substantive offense do not merge upon consummation of the agreement. See *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946).

"second or subsequent" convictions within the meaning of the statute. In that situation, the court reasoned that a "single criminal transaction" could not serve as the basis for consecutive sentences under Section 924(c)(1). 937 F.2d at 391. *Freisinger* has no bearing on the distinct question presented in this case—whether multiple Section 924(c)(1) convictions, based upon two separate drug trafficking offenses resulting from a continuing drug trafficking scheme, can constitute the basis for consecutive sentences.

2. Petitioner Lopez contends (94-1432 Pet. 11-12) that he was improperly convicted under 18 U.S.C. 924(c) of using the AK-47 rifle found in the trash can in front of his residence and the .38 caliber semi-automatic pistol found in his bedroom during and in relation to a drug trafficking crime. More specifically, he claims that those weapons were located several miles away from the site of his arrest and, therefore, could not have facilitated the delivery of heroin to the undercover agents.

On April 17, 1995, this Court granted certiorari in *Bailey* v. *United States*, No. 94-7448, and *Robinson* v. *United States*, No. 94-7492, and consolidated the two cases for briefing and argument. Those cases present the question whether evidence of proximity and accessibility of a firearm to the drugs or the proceeds of drug trafficking is sufficient to permit a jury to infer that a defendant has "use[d] or carrie[d]" the firearm "during and in relation to [a] * * * drug trafficking crime" in violation of 18 U.S.C. 924(c)(1). The decision in *Bailey* and *Robinson* could affect the proper disposition of petitioner Lopez's claim that the evidence was insufficient to convict him on one of the Section 924(c)(1) counts

in this case. Therefore, Lopez's petition (No. 94-1432) should be held pending this Court's resolution of *Bailey* and *Robinson* and then disposed of accordingly.

CONCLUSION

The petition for a writ of certiorari in No. 94-1412 should be denied. The petition for a writ of certiorari in No. 94-1432 should be held pending this Court's resolution of *Bailey* v. *United States*, No. 94-7448, and *Robinson* v. *United States*, No. 94-7492, and then disposed of accordingly.

Respectfully submitted.

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